Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

PRESERVING THE OPEN INTERNET	)	GN Docket No. 09-191
	)	
BROADBAND INDUSTRY PRACTICES	)	WC Docket No. 07-52

REPLY COMMENTS OF THE

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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SUMMARY

ITTA supports market-driven policies that encourage robust broadband deployment and adoption, and commends the Commission to continue current "light touch" practices with regard to broadband Internet access. In the instant proceeding, particularly, any Commission interest in attaching regulations to broadband Internet access must overcome the clear standards articulated by the United States Court of Appeals for the District of Columbia Circuit in *Comcast v. Federal Communications Commission.* To the extent the Commission would establish a sustainable basis for regulation, however, the Commission should steer clear of all-encompassing non-discrimination rules. Demand for broadband services is growing; typical speeds are increasing; and providers, hardware manufactures, and applications developers are introducing an ever-broader array of products. The Commission should not foreclose provider opportunities to enter into reasonable and lawful commercial agreements, and should accordingly refrain from considering regulatory strictures that prohibit discrimination beyond the general proscription against "unreasonable and unjust" discrimination set forth by the Communications Act of 1934, as amended.

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To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits these reply comments in the above captioned-dockets.[1] ITTA is an alliance of mid-sized local exchange carriers that collectively provide service to 24 million access lines in 44 states, offering subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services. ITTA supports market-driven policies that encourage robust broadband deployment and adoption, and commends the Commission to continue current "light touch" practices with regard to broadband Internet access. In the instant proceeding, particularly, any Commission interest in attaching regulations to broadband Internet access must overcome the clear standards articulated by the United States Court of Appeals for the District of Columbia Circuit in *Comcast v. Federal*

[1] *See, Preserving the Open Internet; Broadband Industry Practices: Notice of Proposed Rulemaking,* GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (rel. Oct. 22, 2009) (NPRM).

Communications Commission.[2] To the extent the Commission would establish a sustainable basis for regulation, however, the Commission should steer clear of all-encompassing non-discrimination rules. At maximum, only proscriptions against unjust and unreasonable discrimination should be considered.

II. DISCUSSION

A. THE COMPETITIVE MARKET DOES NOT JUSTIFY INTERVENTION

In the instant Notice of Proposed Rulemaking,[3] the Commission explains that it is committed to promote "investment and innovation with respect to the Internet" and "other communications technologies." The proposal to prohibit *any* form of discrimination by providers of broadband Internet access, however, would be a self-defeating measure. Demand for broadband services is growing; typical speeds are increasing; and providers, hardware manufactures, and applications developers are introducing an ever-broader array of products. The Commission should not foreclose provider opportunities to enter into reasonable and lawful commercial agreements, and should accordingly refrain from considering regulatory strictures that prohibit discrimination beyond the general proscription against "unreasonable and unjust" discrimination set forth by the Communications Act of 1934, as amended.

The Commission has exercised a largely "hands-off" approach to broadband Internet access. This overall policy is consistent with the Act, which prescribes the

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[2] *Comcast Corporation v. Federal Communications Commission,* No. 08-1291, slip. op. (D.C. Cir.) (Apr. 6, 2010) (*Comcast*).

[3] *Preserving the Open Internet, Broadband Industry Practices: Notice of Proposed Rulemaking,* GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93, at para. 51 (2009).

"policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[4] As noted in ITTA initial comments, the market has responded favorably to the Commission's commitment, consistent with Congressional directive, to enable market forces to shape the market successfully.[5] And, as noted by ITTA previously, proponents of "net neutrality" are unable to identify any instances in which current policies have been insufficient to address disputed issues; moreover, "net neutrality" proponents are unable identify more than a handful of instances in which the Commission was even compelled to invoke existing (and effective) policies in order to resolve a dispute. Notwithstanding this history, "net neutrality" proponents have argued that regulations should be imposed without regard for the level of competition in the access market;[6] Free Press argues that absent regulations, ISPs will pursue their allegedly primary objectives of reducing capital expenditures, increasing revenues, and eliminating jobs.[7] The Commission should reject these unfounded claims. Colorable abuse in the broadband Internet access market cannot be identified. Absent the oft-cited *Madison River* and *Comcast* proceedings, both of which were resolved under current policies, neutrality proponents are hard-pressed to identify patterns of improper behavior. In fact, as AT&T notes, many of the market arrangements that supposedly create the potential for

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[4] 47 U.S.C. § 230(b)(2).

[5] Comments of ITTA at 5-9.

[6] Comments of Open Internet Coalition at 70-76.

[7] Comments of Free Press at 62-64, 73.

problems already exist, and have not resulted in problems.[8] Although some parties claim that providers will invest less in capacity in order to artificially increase the perceived value of their more premium services,[9] notions that providers would engage in activities to hamstring access in today's competitive markets are ill-conceived. A White Paper explains,

> [i]t just doesn't make any sense in terms of network engineering and economics, because a very well-known rule, the first principle of network engineering and economics, is that the value of your network is heavily dependent upon the number of people subscribing to it, or using it. You're not going to make more money, if you're a broadband provider, by screwing people over. It's really that simple. You're going to want to offer them more services, more things to access and therefore, you're going to want to cut deals that are pro-consumer and offer them more choices.[10]

As described above, the market has developed successfully, and intervention should not be imposed.

B. INTERVENTION WILL CAUSE ADVERSE EFFECTS

The imposition of broad prohibitions, in addition to conflicting with the principles engaged in the *Comcast* decision, would conflict directly with Congressional "inten[tion] to maintain a regime in which information service providers are not subject to Title II

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[8] Comments of AT&T at 115.

[9] Comments of Open Internet Coalition at 31.

[10] *See,* "Net Gains or Net Losses? The Net Neutrality Debate and the Future of the Internet," K. Lloyd Billingsley, Pacific Research Institute, San Francisco, CA, at 18 (2007) (Billingsley) quoting Adam Thierer, in "Progress on Point," Progress and Freedom Foundation, October 2006, at 10-12 (edited transcript of Jul. 18, 2006, program at Washington, DC).

regulations as common carriers."[11] AT&T describes the NPRM's lack of any "analysis whatsoever of competition in the market" as "inexplicable and indefensible,"[12] and, as Qwest notes, there is no evidence that the market has failed.[13] The lack of existing problems is corroborated by a champion of restrictive principles, who predicted that if the Commission does not promulgate broad restrictions, "we will be less happy, but then we will have to wait and see *whether or not there actually is any abuse.*"[14]

The net effect of blanket "non-discrimination" would prevent network owners from maximizing returns on their investment. As Qwest notes, "It is simply not reasonable to anticipate that broadband providers will build enough capacity to satisfy peak demand, which, by definition, is not going to be used very often."[15] Providers that are barred from offering QOS alternatives, and accordingly forced to forego the increased revenue opportunities those services enable, will be constrained to build a narrower network. The New Jersey Division of Rate Counsel argues incorrectly that the

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[11] *See* Comments of CenturyLink at 21, citing *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 at para. 41 (2007).

[12] Comments of AT&T at 225.

[13] Comments of Qwest at 8.

[14] Comments of AT&T at 121, *citing* Reuters, *Google says bill could spark antitrust battle,* Computer World, Jul. 5, 2006, http://www.computerworld.com/s/article/9001570/Google_says_bill_could_spark_antitrust_battle.

[15] Comments of Qwest at 35, *citing* Traffic Management and the Open Internet, Scott Jordan, Department of Computer Science, University of California, Irvine, from the Dec. 8, 2009, Open Internet Workshop, Technical Advisory Process on Broadband Network Management.

introduction of preferential categories of traffic that demand higher prices will somehow *discourage* investment in additional capacity.[16] Rather, carriers permitted to engage in opportunities that meet the rapidly increasing amounts of bandwidth demanded by consumers can leverage those opportunities to augment broadband deployment, leading ultimately to better offerings for all users. A recent White Paper agrees: consumer welfare will be harmed if providers must remove QOS from the marketplace, offering "one size fits all" networks instead.[17] Citing airline industry use of tiered ticket pricing, the White Paper illustrates the undesired effects that would accrue were airlines compelled to blend the pricing and amenities of "economy" and "first class" into a single type of offering.[18] Similarly, broadband Internet users should not be denied the opportunity to enjoy priority service for a higher price, or lower rates for more basic offerings. These models are prevalent throughout goods and services industries; the U.S. Postal Service recognizes that some customers will pay premium rates to opt for either Priority or Express service over First Class. "Asking all users to pay the same amount, regardless of how much data they download, hardly seems fair."[19]

Proposals to prohibit flexible business models for providers of broadband Internet service access ignore the manner in which Internet networks operate, and instead

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[16] Comments of New Jersey Division of Rate Counsel at 7.

[17] Robert W. Hahn, Robert E. Litan, "The Myth of Net Neutrality and What We Should Do About It," AEI-Brookings Joint Center for Regulatory Studies, at 10 (Hahn, Litan).

[18] Hahn, Litan at 11.

[19] Robert E. Litan, "Catching the Web in a Net of Neutrality," Brookings Institution, at 2 (Feb. 19, 2010) (Litan).

contemplate the notion of an end-user funded network. That result should be avoided. As explained in a recent White Paper,

> The Internet is not only the little piece that comes to my home. It's a lot of a networks that are connected together, a lot of backbone suppliers that are connected together. Those backbone suppliers have always exercised non-neutral attitudes. . . . [D]iscriminatory routing . . . is necessary for the operation of the Internet.[20]

A "one size fits all" model would be highly inefficient and would impose a disproportionate impact on rural and high-cost areas, which are precisely the regions in which further investment in broadband must be encouraged. A policy paper explains,

> Increasing the costs of building or operating a broadband network by regulatory mandate unquestionably will result in lower broadband network construction across the board. But our analysis shows that this decline in construction will not be evenly spread across the country as a whole – in fact, deployment in high-cost areas will be harmed disproportionately by any such cost-increasing mandate.[21]

The broadband Internet access market must benefit from providers' opportunities to identify and implement profitable and market-driven product strategies. Constraining provider opportunities to maximize returns conflicts with incentives that drive private investment. As noted in a recent paper addressing this topic, "[t]he goal of investing in real assets is generally taken to be the maximization of shareholder value as reflected in

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[20] Billingsley at 19, *quoting* David Farber, in "Progress on Point," Progress and Freedom Foundation, October 2006, at 13-14 (edited transcript of Jul. 18, 2006, program at Washington, DC).

[21] George Ford, Thomas Koutsky, Lawrence Spiwak, *The Burden of Network Neutrality Mandates on Rural Broadband Deployment,* Phoenix Center Policy Paper No. 25 (Jul. 2006), at 18 (available at http://www.phoenix-center.org/pcpp/PCPP25Final.pdf (last viewed Apr. 25, 2010, 14:27).

rates of return by investors who own the assets."[22] The American Recovery and Reinvestment Act of 2009[23] set into motion a triumvirate of efforts intended to increase broadband deployment throughout the Nation. The NBP, along with the RUS Broadband Initiatives Program and NTIA Broadband Technology Opportunities Program, recognize that comprehensive National broadband deployment will ultimately be driven by the partnership of private sector and public investment. Toward that end, ITTA has consistently advocated policies that increase incentives for private sector investment, which in turn lessens the impact of broadband deployment needs on Federal resources and drives innovation. TDS Telecom explains that managed services are a critical component of new communications offerings, and that in the broadband Internet access market, prioritization is essential to managed service offerings.[24] The blanket prohibition on discrimination, however, would seem to bar carriers from offering different levels of service to different customers, potentially leading to depressed innovation, investment, and adoption. In the words of CenturyLink, the "strict rule would handicap broadband services providers" by preventing efficiencies, preempting opportunities to improve QOS, and diminishing opportunities for providers to distinguish themselves in a competitive marketplace.[25]

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[22] Larry F. Darby, "The Informed Policy Maker's Guide to Regulatory Impacts on Broadband Network Investment," American Consumer Institute Center for Citizen Research, at 3 (Darby).

[23] American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, 42 U.S.C. sec. 6001(k)(1) (2009) (ARRA).

[24] *See, generally,* Comments of TDS.

[25] Comments of CenturyLink at 16.

Regulatory uncertainty also causes adverse impacts. Factors that affect value, generally, include risk, future cash flow and earnings, growth over time, options, and opportunities.[26] The possibility that providers will invest in networks now but be prohibited from adequately recovering their investment in the future has a chilling effect on investment incentives and, consequently, network value. The specter of regulatory uncertainty looms when the Commission proposes regulations that could affect providers' abilities to maximize returns. Simply posing questions imbues the process with risk.[27] Investment markets react badly to regulatory uncertainty, and the potential results run opposite to the Commission's stated goal of encouraging "investment and innovation with respect to the Internet."[28] These adverse effects are exacerbated when uncertainty is compounded by perceptions of a "glacial pace of regulatory decision making,"[29] and expectations that restrictive regulations, once released, will be challenged vigorously.[30]

The imposition of unnecessary and restrictive regulations will thwart investment, especially in rural and high-cost areas. A blanket non-discrimination rule would devalue provider investments, depress incentives for private capital, and diminish the likelihood

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[26] Darby at 4.

[27] Darby at 5.

[28] NPRM at para. 51.

[29] Darby at 4

[30] *See, i.e.,* "Telecom Giant Challenges FCC Role in Broadband," Cecilia Kang, Washington Post, A14 (Mar. 25, 2010).

of users to obtain services they demand. For these reasons and those described above, the Commission should reject the proposed non-discrimination rule.

C. AT MOST, ONLY UNJUST AND UNREASONABLE DISCRIMINATION SHOULD BE PROSCRIBED

The proposed non-discrimination rule leaps past standards normally set by Congress and implemented by the Commission. As ITTA stated in initial comments the Commission should encourage, as it has historically, the market's development unencumbered by regulation. To the extent the *Comcast* principles can be overcome, the Commission must refrain from regulations that prohibit discrimination beyond the Communication Act's general proscription against "unjust and unreasonable" discrimination.[31]

As noted above, providers should not be enjoined from meeting the varying needs of users that place a premium on speed, and who are willing to pay for that option. As noted by CenturyLink, the NPRM itself acknowledges benefits of discrimination: "[T]he ability of a provider to price discriminate not only will benefit the provider, but may also benefit the public as a whole (although not necessarily in all cases)."[32] AT&T warns that "strict non-discrimination would actually harm consumer interests."[33] Packets travel at different speeds for different users -- content providers required to pay for the cost of capacity that enables their services can recover those costs from their customers, or use

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[31] 47 U.S.C. § 202(a).

[32] Comments of CenturyLink at 6, *citing* NPRM at para. 66.

[33] Letter to Julius Genachowski, Chairman, FCC, from James W. Cicconi, Senior Executive Vice President, External and Legislative Affairs, AT&T, Jan. 12, 2010, at 3.

enhanced capacity to generate revenue in other ways, such as advertising.[34] The NPRM proposal, by contrast, would foist all of those costs upon end-users.

A recent White Paper reminds that "offering different services at different prices does not represent discrimination" under a standard of "equality of opportunity," "*so long as the offering is available to all consumers on equal terms.*"[35] This analytical construct addresses the concerns of several groups that ISPs may be tempted to accord their own offerings priority status over the offerings of others.[36] Those *economic* concerns, however, should not be improperly conflated with social or political discrimination; the Commission must not foreclose further broadband Internet access development by banning reasonable economic discrimination that enables providers to offer services that reflect various user preferences. The recognition of these types of differences or other business realities "must be considered when approaching the costs of any business, particularly the provision of a capital-intensive service such as a broadband."[37]

The inappropriateness of a strict non-discrimination rule in the competitive broadband Internet access market becomes even more apparent when it is considered that the monopoly telephone market was subject only to prohibition on unjust and

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[34] Hahn, Litan at 3.

[35] Robert Hahn, Robert Litan, Hal Singer, "Addressing the Next Wave of Internet Regulation: The Case for Equal Opportunity," Georgetown Center for Business and Public Policy, Georgetown University, Wash. DC, 14-15 (Jan. 2010) (emphasis in original) (Georgetown Center).

[36] Comments of Public Knowledge, Consumers Union, Media Access Project, New America Foundation, Center for Media Justice at 48, 49.

[37] Comments of Qwest at 6.

unreasonable discrimination. As Qwest explains, the Commission should not prohibit "prioritization or enhancements" that are directed by the customer.[38] Applications such as on-line gaming evidence the need to recognize that certain users and content providers may require substantial capacity. In these instances, for example, a gaming content provider could pass costs on to its customers.[39] But there is no sensible reason to force a non-gaming user (whether content provider or end-user) to shoulder costs that could be recovered from those who desire the value-added service of capacity, prioritization, or other specifications that may be useful to others.

III. CONCLUSION

The Commission's ability to impose regulations is limited by the principles set forth in the in the *Comcast* decision. To the extent the Commission crafts a sustainable basis upon which to impose regulation, it should refrain from implementing standards that reach beyond the Act's general proscriptions against unjust and unreasonable discrimination.

Respectfully submitted,

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[38] Comments of Qwest at 47.

[39] *See,* Hahn, Litan at 7.